tioned outside the building (II R. 100). Soon afterward, petitioner Gunther entered the rest room and for about fifteen minutes conducted himself in a manner which indicated that he was seeking to engage in homosexual activity (II R. 162).[7] Gunther left the building briefly, then returned and continued to act as he had before for another fifteen minutes (II R. 163). He left the building again, and soon returned (II R. 164). Petitioner Smayda then entered the rest room and occupied a toilet stall adjacent to that occupied by petitioner Gunther. At approximately 11:50 p.m., Smayda utilized the hole cut in the partition to participate in oral copulation with petitioner Gunther (II R. 164, 170). The ranger located in the attic observed the act and the photographer took pictures of it, which were introduced in evidence (II R. 164, 167, 170; Government Ex. 5, 6). The two rangers stationed outside were immediately summoned by radio. They entered the rest room and arrested petitioners, who were still in the stalls (II R. 167–168).

Prior to trial, petitioners moved to suppress the evidence that had been obtained by means of the concealed observation described (I R. 7–12, 14–25). At trial they objected to the admission of such evidence but their objections were overruled (II R. 100, 162, 168–169).

ARGUMENT

The district court properly admitted the testimony of the ranger who conducted the surveillance described

[7] The opinion of the court of appeals summarizes in detail Gunther's conduct at that time (Pet. App. C, p. 6).

in the Statement, *supra,* and the photographs obtained through such surveillance. There was no violation of the Fourth Amendment.

1. The numerous complaints by guests and employees regarding "almost daily" homosexual activity in the Camp Curry area, the assaults on young victims, the continual late-evening loitering around rest room No. 600 by individuals who appeared to be seeking homosexual contacts, the presence of at least one known homosexual offender in the vicinity, and the repeated property damage suffered by the Curry Company, confronted the Park authorities with a uniquely dangerous and immediate problem. Charged with the duty of protecting the legitimate tourists and their families, the rangers, who had police responsibility in the Park, decided that they must take quick and effective action; the management of the Curry Company had independently reached the same conclusion. Although offenses were occurring "almost daily" in rest room No. 600 and its immediate vicinity, the Park rangers and the Curry Company decided to confine their undercover observation to that particular location late at night on Saturdays, when the most flagrant activity was known to occur and when legitimate users of the rest room facilities had, for the most part, retired for the night. This is in marked contrast to the indiscriminate "spying, regularly and as a matter of course, upon each and every occupant," involved in the two California Supreme Court cases relied upon by petitioners (Pet. pp. 7–8). *Britt* v. *Superior Court of Santa Clara County,* 24 Cal. Rptr. 849, 374 P. 2d

817; *Bielicki* v. *Superior Court of Los Angeles County,* 21 Cal. Rptr. 552, 371 P. 2d 288, 292. Only two periods of surveillance were involved in this case. Both lasted only one hour; both were conducted on Saturday evenings between the hours of 11:00 and 12:00 p.m.; and both were confined to the single rest room in the Camp Curry area that was the focal point of the homosexual activities. Obviously, the surveillance in this case was narrowly limited, and did not involve the great majority of the legitimate users of the rest room, who had already retired by that time of night (II R. 97). Moreover, in the California cases the police officers were found to have had no grounds for even suspecting criminal activity, while in the instant case complaints of criminal activity were made almost daily.

Contrary to petitioners' assertions (Pet. p. 6), the rangers' covert observation of rest room No. 600 was conducted not "for the purpose of finding evidence of a crime" but to put a stop to the known criminal homosexual activity in the Camp Curry area. The Park rangers, because of their many other official duties, and a lack of manpower for police work (II R. 96, 101), could not conduct full time open patrolling of the rest room, although they did patrol the rest room openly as much as limitations allowed. The identity of the individuals committing the acts complained of was necessarily unknown, even to the victims, because of the seclusion available at the time of each such act. The offenders unscrewed light bulbs in the rest room in order to have absolute darkness

for their activities (II R. 40). In the circumstances, failure to identify and apprehend the offenders at the time of the crime would have resulted in their escaping detection altogether and remaining free to prey on others; it is difficult to see how they could have been apprehended without concealed observation of rest room 600.

In view of the unique and exigent circumstances—the overwhelming grounds for believing that homosexual offenses were being committed in rest room 600 and the unparalleled opportunity afforded potential offenders to commit homosexual offenses there absolutely undetected—and the carefully tailored and limited observation conducted, we submit that the rangers acted reasonably and constitutionally in obtaining the evidence in question.

2. There was, in any event, no actual intrusion into a constitutionally protected area in the circumstances. The ranger and the photographer in the attic of the rest room were lawfully on the premises, which belonged to the Curry Company. The Curry Company had a right to alter its own building as it saw fit, and no representation of absolute privacy was made by the Company to users of its rest rooms. Moreover, in view of the many holes that had been cut into the toilet stall partitions and doors, it was immediately apparent to any user of such a stall that he could not enjoy absolute privacy. Petitioners, moreover, had not entered the toilet stalls in order to obtain the "modicum of privacy" (Pet. App. C, p. 21) afforded there for the normal bodily functions, but solely to

commit a felony. No federal court has held the toilet stall of a public rest room to be one of the areas protected by the Fourth Amendment from government incursion. The two California State court decisions [8] so holding involved, as we have indicated above, significantly different factual situations with respect to the justification and scope of surveillance, as well as different physical arrangements (Pet. App. C, p. 7, note 2). And we submit that the broad question of whether there is a constitutional right of privacy in the use of public rest room facilities is not presented here in view of the unique and exigent circumstances in this case.

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[8] The California decisions are in any event not controlling in this case. The Assimilative Crimes Act incorporates by reference State statutes for the definition of the offense and the penalty, but it does not incorporate the criminal procedure and constitutional law of California. The lawfulness of an alleged search and seizure is thus to be tested by federal, not State, standards. See *Williams* v. *United States*, 327 U.S. 711; *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 388–392; *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 266; *McCoy* v. *Pescor*, 145 F. 2d 260, 262 (C.A. 8), certiorari denied, 324 U.S. 868. Cf. *Elkins* v. *United States*, 364 U.S. 206.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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